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BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

Postal Rate and Fee Changes, 2001

Docket No. R2001-1

COMMENTS OF THE UNITED STATES POSTAL SERVICE
IN REPLY TO SUGGESTIONS OF AMERICAN POSTAL WORKERS UNION FOR
PROCEDURAL MECHANISMS AND SCHEDULES
(January 28, 2002)

The United States Postal Service hereby submits this reply to the January 24, 2002, Suggestions For Procedural Mechanisms And Schedules filed by the American Postal Workers Union, AFL-CIO (APWU).¹

One party, APWU, stands alone in opposition to the settlement agreement presented for consideration in this proceeding. APWU filed no written discovery on the Postal Service's direct testimony in this proceeding and belatedly filed notices of intent to conduct oral cross-examination of Postal Service witnesses Miller (USPS-T-22) and Robinson (USPS-T-28).² In its January 15, 2002 Notice of Opposition, APWU declared its objection to the First-Class Mail rate design agreed to by the settlement parties and identified the narrow issue of "avoided cost" as the subject matter of any testimony it would file on January 30th.

The Postal Service would have preferred that APWU be among the parties

¹ Submitted as a response to the January 22, 2002, Motion Of United States Postal Service For The Establishment Of A Procedural Mechanism And Schedule Governing Further Proceedings In Light Of Settlement.

² According to Presiding Officer's Ruling No. R2001-1/27 at 6 (January 31, 2001), the notices filed on January 9, 2002, were due to have been filed on January 7, 2002.

supporting settlement and considers APWU's opposition to settlement as a missed opportunity at a critical juncture in postal history. Nevertheless, APWU's objection to settlement on the very narrow grounds identified in its January 15th Notice of Opposition reveals that the remainder of this proceeding can focus on a single issue, presumably of interest to a relatively small number of intervenors. Accordingly, present circumstances call into question whether the usual timetables and deadlines necessary for the exploration of the usual myriad of unresolved issues should apply. The Postal Service considers that the present circumstances favor a procedural schedule that not only is fair to all parties, but that also proceeds on a more expeditious basis than that to which it and the other parties may be accustomed. Accordingly, on January 22nd, the Postal Service proposed the procedural mechanisms and schedule to which APWU has objected. Below, the Postal Service explains why the alternative suggestions of APWU should be dismissed.

Discovery Deadlines

At pages 1-2 of its Suggestions, APWU objects to the Postal Service's January 22nd proposals to shorten the deadline for interrogatory responses and the deadlines for filing discovery-related motions and responsive pleadings. APWU describes the Postal Service's proposals as "unworkable." As an alternative, APWU argues that it "is willing to see some shortening of the response times if other changes are made to the rules concerning interrogatories." APWU Suggestions at 2. APWU proposes shortening the deadline for interrogatory responses from 14 to 10 days and maintaining the current 10-day deadline for filing objections, but only subject to three conditions listed in the

middle of page 2 of its Suggestions.³

The Postal Service considers that its January 22nd proposal for expedited treatment of APWU's testimony equitably spreads any burden on all interested parties. The onus is on interrogating parties to expeditiously examine the testimony thoroughly and to begin generating interrogatories, should they so desire, soon after receipt of the testimony. The proposed elimination of an extended period for review of APWU's testimony⁴ will provide interested parties with an extraordinary, self-imposed incentive to be efficient and expeditious in their resort to discovery. Such discovery can be accommodated and minimized if, as requested by the Postal Service at page 4 of its January 22nd Motion, the testimony and related documents are e-mailed to interested parties on the morning or afternoon that it is filed with the Commission and all testimony, exhibits, workpapers, and library references clearly set forth all calculations involved in deriving outputs and the record sources for all inputs to such calculations.

³ Regarding the three conditions under which APWU is willing to provide interrogatory responses within 10 days of receipt of the questions, the Postal Service has only one observation. Irrespective of the interrogatory response deadline settled upon by the Commission, APWU should not be absolved of its obligation to serve copies of its testimony and interrogatory responses on all parties of record in this proceeding. It is impossible to predict whether APWU's testimony or its interrogatory responses, explicitly or implicitly, will have a bearing on issues outside the scope of First-Class Mail cost avoidance and could affect the interests of intervenors (settlement parties or otherwise) presently not expecting to be directly involved in the proceedings generated by APWU's testimony. However, those parties are entitled to notice regarding whether their interests may be affected. Accordingly, even if they do not formally register their interest as participants desiring additional e-mail service of APWU-related documents, all parties should be regularly served with copies of all testimony and pleadings generated as a result of APWU's opposition to settlement.

⁴ Which, according to APWU, will be limited to the very narrow topic of First-Class Mail avoided costs.

Since the APWU testimony has not been filed, the Postal Service cannot presently predict how much, if any, written discovery it will deem to be necessary. Nor can it speak for other parties in this regard. Nevertheless, the Postal Service is committing itself to the highest level of expedition in the generation of interrogatories it may file. If there are questions that require more than five days to prepare responses, there is nothing to prevent APWU from requesting appropriate relief, as is contemplated by the Postal Service's January 22nd Motion at page 3.

At page 3 of its Suggestions, APWU expresses concern about the possibility that, under the Postal Service's proposed schedule, some APWU interrogatory responses may not be due until after APWU's witness or witnesses testify. That is true, if there are any interrogatory responses outstanding on the date of hearings. But this is a circumstance the Commission has faced in the past. Witnesses can be asked to respond to any outstanding written questions on the stand. If they are unable to do so, APWU can simply file the written responses when they are ready and the interrogating parties can move to designate those responses into the record on a later date. Again, the Postal Service and other interrogating parties have an incentive to engage in written discovery expeditiously in order to minimize this prospect.

Deadline For Objections

The Postal Service does not know what to make of APWU's proposal that the current 10-day deadline for objecting to interrogatories be retained, subject to the three conditions outlined on page 2 of APWU's Suggestions. Contrary to standard procedure, APWU's proposal would relieve it of any obligation to give notice of any objections before the due date for responses to the interrogatories in question. Such a proposal is

patently contrary to the intent of the regular rules and would serve to undermine even APWU's rather modest concession to expedition in the filing of interrogatory responses. Whatever deadline is established for the filing of interrogatory responses, APWU should be required to give notice of any objections at least several days in advance of the response due date, in order to expedite the resolution of any discovery disputes.

The Postal Service's proposed shortening of the deadline for objections and discovery-related motions practice is in recognition of the unique circumstances of this proceeding. The subject matter of APWU's testimony is expected to be limited. APWU and the relatively few parties expected to actively address its testimony will not be distracted or burdened by the demands of having to address other Docket No. R2001-1 testimony. Accordingly, it is not unreasonable to expect those parties to be able to expeditiously resolve any issues generated by APWU's testimony.

Hearings And Discovery On Rebuttal Testimony

In its January 22nd Motion, the Postal Service proposed procedures for consideration of any rebuttal testimony that may be filed in response to APWU's case-in-chief. At page 3 of its Suggestions, APWU argues that it would be unacceptable for the Commission to adopt the Postal Service's January 22nd proposal that hearings on rebuttal testimony be conducted six days after such testimony is filed. APWU's rationale is premised upon a flawed declaration of entitlement to written discovery on rebuttal testimony. Accordingly, its opposition to the Postal Service's proposal should be dismissed.

At page 3, APWU correctly observes that, ordinarily, there is no written cross-examination of rebuttal testimony. However, APWU then argues that non-postal

witnesses responding to APWU testimony “are not true rebuttal witnesses . . .” because “[t]heir testimony would normally have been presented in case-in-chief of intervenors and would have been subject to written cross-examination. APWU Suggestions at 3-4.

Whether or not any intervenor or postal testimony filed in response to APWU’s case-in-chief constitutes “true rebuttal” testimony is a matter that cannot be judged until such rebuttal testimony is filed.⁵ The Commission has procedures that permit motions to strike, should any party consider rebuttal testimony to be outside the scope permitted by the Commissions’ rules. It is presumptuous for APWU to prejudge rebuttal testimony yet to be prepared in response to APWU testimony that, itself, has yet to be filed.

APWU’s assertion that non-postal testimony “would normally have been presented in case-in-chief of intervenors and would normally have been subject to written cross-examination” confuses the purposes served by intervenors’ cases-in-chief, on the one hand, and their rebuttal testimony, on the other. Moreover, the assertion makes no sense in the context of the current proceeding.

Normally, intervenors challenging the Postal Service’s requested rates and classifications would present alternative proposals in their cases-in-chief. The next round of testimony -- rebuttal testimony -- traditionally has been reserved for the purpose of allowing the parties to respond to each other’s cases-in-chief. See Rule 30(e)(1). Whether an intervenor supports the proposed settlement in the current

⁵ See 39 C.F.R. § 3001.30(e)(1), which states that “[n]ew affirmative matter (not in reply to another participant’s direct case) should not be included in rebuttal testimony or exhibits.”

proceeding and, therefore, elects not to file a case-in-chief, has no bearing on whether that intervenor may file rebuttal testimony responsive to the case-in-chief of a settlement opponent. Contrary to the assertions at page 4 of the APWU Suggestions, an intervenor that elects not to file a case-in-chief in response to the Postal Service's request, but elects to file proper rebuttal testimony responsive to APWU's case-in-chief, will not have "delayed" the filing of its case-in-chief; nor will the filing of such rebuttal testimony have "deprived" APWU of any right to conduct written discovery.

If an intervenor does not have a case-in-chief to file or elects not to file one, that intervenor is still, under appropriate circumstances, allowed to file rebuttal testimony. A party's decision to only file proper rebuttal testimony in response to APWU's case-in-chief will not, as alleged by APWU, constitute some form of "delay." The filing of a case-in-chief is not a prerequisite to the filing of proper rebuttal testimony.

Traditionally, different procedural mechanisms have been applied to the different rounds of testimony, which serve different purposes in Commission proceedings. Ordinarily, there is written discovery on intervenors' cases-in-chief, but no written discovery on rebuttal testimony. Accordingly, the absence of procedures for written discovery on rebuttal testimony in Docket No. R2001-1 will not "deprive" APWU of anything.

The extraordinary reduction in the number of Docket No. R2001-1 intervenor cases-in-chief -- from the usual four or five dozen to a solitary one -- does not, by itself, convert intervenor testimony rebutting that solitary case-in-chief into something other than rebuttal testimony. Nor does the current state of Docket No. R2001-1 require that such rebuttal testimony be subject to any extraordinary discovery mechanisms.

Assuming that there will be testimony rebutting APWU in the current proceeding and assuming that it conforms to the rules applicable to the substance of such testimony, there will be no basis for extending to APWU the extraordinary privilege of conducting written cross-examination on such testimony, as requested at page 4 of the APWU Suggestions. Under normal circumstances, when there can be five or six dozen separate pieces of testimony supporting various intervenors' cases-in-chief, followed by three or four dozen separate pieces of rebuttal testimony, the Commission has not found it necessary to permit discovery on rebuttal testimony.

Of course, the Commission cannot pre-judge whether extraordinary circumstances *might arise which could justify such extraordinary procedures*. Accordingly, the Commission should not inject such procedures into the schedule of this proceeding unless and until it determines that they are necessary.

At page 4, APWU argues that scheduling hearings on rebuttal testimony six days after such testimony is filed also is unacceptable. In response, the Postal Service observes that in past proceedings, it has been deemed reasonable for parties to be prepared to cross-examine up to four dozen rebuttal witnesses beginning less than 10 days after the filing of such testimony. *See, for example*, Presiding Officer's Ruling No. R2000-1/113 (August 10, 2000). Accordingly, the Postal Service considers that it cannot be presumptively unreasonable to expect a party to be prepared to cross-examine fewer than a handful of rebuttal witnesses six days after the filing of such testimony, particularly if that rebuttal testimony is limited to the relatively narrow subject matter of the interrogating party's case-in-chief.

APWU Surrebuttal Testimony Proposal

APWU argues that:

the schedule proposed by the Postal Service does not provide for the APWU to rebut the presentations of other participants. . . . Consequently, in order to provide APWU an opportunity to rebut presentations of other participants, as required by the Commission's rules, time must be included for APWU to determine whether to file rebuttal testimony to the testimony of other participants and then to file and defend that testimony.

APWU Suggestions at 4. Under the schedule proposed by the Postal Service on January 22nd, APWU already has an opportunity to rebut the presentations of other participants. The "presentations of other participants" are reflected in the Postal Service's request, its direct testimony, and in the proposed settlement agreement. Under Rule 30(e)(1), APWU's case-in-chief "shall include . . . [its] direct case and rebuttal, if any, to the initial proponent's case-in-chief." Under the circumstances of this proceeding, it seems appropriate to regard the Postal Service and the settlement parties as the "initial proponents" and the settlement proposal as the initial proponents' case-in-chief." If APWU wants to rebut the Postal Service's request or the proposed settlement rates, it should include any such rebuttal in its case-in-chief.

Th rule further states that "[t]here will be an opportunity for participants to rebut presentations of other participants and for the initial proponent to present surrebuttal evidence." When APWU files its case-in-chief on January 30th, it will have exercised its opportunity to rebut the initial proponents' case. Then, under Rule 30(e)(1), the initial proponents are entitled to surrebuttal.⁶ Thus, all that Rule 30(e)(1) currently requires is

⁶ It is, of course, premature to say whether the Postal Service will file any testimony rebutting APWU.

reflected in the Postal Service's proposed schedule.

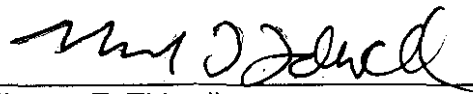
The Commission is not required by its rules to permit yet other rounds of rebuttal testimony. Presumably, the Commission may allow additional testimony if it considers that it has been presented with just cause for doing so. However, it seems presumptuous of APWU to request such extraordinary relief when the several rounds of opposing testimony which would be a necessary prerequisite have not been filed and no extraordinary need for an extra round of rebuttal has been justified.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

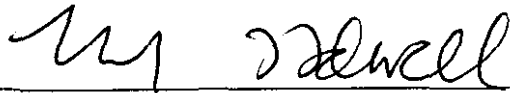
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CERTIFICATE OF SERVICE

I hereby certify that, in accordance with section 12 of the Rules of Practice, I have this day served the foregoing document upon all parties of record in Docket No. R2001-1.



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